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No. 410

In the Supreme Court of the United States

OCTOBER TERM, 1960

OVE GUSTAVSSON CONTRACTING COMPANY, INC.

v.

FRANKLIN G. FLOETE, Administrator of General Services Administration and MICHAEL BRENNAN, Contracting Officer, and Chief, Design and Construction Division, Public Building Service, General Services Administration

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:

Aktiebolaget Bofors v. *United States*, 194 F. 2d 145	6, 8
Almour v. *Pace*, 193 F. 2d 699	8
Arizona, State of v. *Hobby*, 221 F. 2d 198	8
Atlantic Carriers v. *United States*, 131 F. Supp. 1	10
Blackmar v. *Guerre*, 342 U.S. 512	8
Hodgson v. *Dexter*, 1 Cranch 345	6
Kansas City Power & Light Co. v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U.S. 884	8
Land v. *Dollar*, 330 U.S. 731	7
Larson v. *Domestic & Foreign Corp.*, 337 U.S. 682	6
McKay v. *Central Elec. Power Cooperative*, 223 F. 2d 623	7
Mine Safety Co. v. *Forrestal*, 326 U.S. 371	7
Nimro v. *Davis*, 204 F. 2d 734, certiorari denied, 346 U.S. 901	7, 8
United States v. *Holpuch Co.*, 328 U.S. 234	9
United States v. *Smith*, 152 F. Supp. 322	10
Utility Oil Corp., In re, 69 F. 2d 521, certiorari denied, 292 U.S. 655	9

Statutes: Page

Administrative Procedure Act, 5 U.S.C. 1001, *et seq.* 4
Sec. 10 (5 U.S.C. 1009) 5, 8, 11
Tucker Act, 24 Stat. 505, as amended:
28 U.S.C. 1346(a) 7, 12
28 U.S.C. 1491 ..... 5, 12

Miscellaneous:

Federal Rules of Civil Procedure, Rule 12(b) 5
Sen. Doc. No. 248, 79th Cong., 2d Sess. 9

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 3a-4a)[1] is reported at 176 F. Supp. 544. The opinion of the

[1] "R." refers to the appendix to appellant's brief in the court of appeals.

Court of Appeals for the Second Circuit (Pet. 26-29) is reported at 278 F. 2d 912.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1960. A petition for rehearing was denied on June 15, 1960. The petition for a writ of certiorari was filed on September 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's suit for declaratory judgment and monetary damages in excess of $10,000, based on the allegedly wrongful termination of a government contract, is a suit against the United States and beyond the jurisdiction of a district court.

2. Whether the Administrative Procedure Act confers jurisdiction on a district court to review the allegedly wrongful termination of petitioner's government contract.

3. Whether petitioner's suit was subject to dismissal because of the pendency of an administrative appeal taken pursuant to the disputes clause of petitioner's contract.

STATUTES INVOLVED

The relevant provisions of the Administrative Procedure Act and the Tucker Act are set forth in the Appendix, *infra*, pp. 11-13.

STATEMENT

On May 28, 1958, petitioner, a New York corporation, entered into a contract with the United States, acting through appropriate officials of the General Services Administration, to construct a dehumidification hutment for the storage of precision machinery within a government warehouse at Burlington, New Jersey. (R. 20a). Respondent Floete is the Administrator of the General Services Administration. Respondent Brennan is the Chief of Design and Construction, Public Buildings Service of the General Services Administration, and was the designated "Contracting Officer" for the contract in question (R. 5a).

The contract price was $47,000 and construction was to be completed by October 2, 1958 (R. 14a). A clause was provided in the contract setting forth the procedure to be followed in case a dispute arose.[2]

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[2] The disputes clause reads as follows (R. 23a-24a):

Disputes. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final

Work was not commenced until early in November, 1958, and respondent Brennan extended the time for completing the job accordingly (R. 15a, 16a). On January 12, 1959, Brennan, acting under the "Termination for Default" clause of the contract (R. 21a-23a), notified petitioner in writing that the government was terminating petitioner's right to proceed because of its failure to execute and complete the work satisfactorily (R. 17a-18a). Within thirty days of the receipt of the above notice petitioner appealed the decision to the Administrator of the General Services Administration. The administrative appeal is still pending.[3] On March 13, 1959 a new contract was awarded to another contractor to complete the hutment. The second contractor completed it sometime in September, 1959 (Pet. 26).

By this action petitioner sought judicial review, under the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, of the action of respondent Brennan in cancelling the contract (R. 5a). Petitioner as-

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and conclusive: Provided, that, if no such appeal to the head of the department is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

[3] Three days of hearings have been held on the appeal before the General Services Board of Review in Washington, D. C., but a final determination of the dispute has not been rendered.

serted that the action of Brennan was fraudulent, arbitrary, capricious or so grossly erroneous as to imply bad faith. Injunctive relief against the awarding of another contract for the completion of the hutment was requested[4] as well as a declaratory judgment that the termination of the contract was unlawful. In addition, damages against both respondents and the United States in excess of $10,000 were sought (Pet. 28). Respondents moved for dismissal under Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the court lacked jurisdiction over the respondents and the subject matter.

The district court granted respondent's motion on the grounds: (1) that respondent Floete, who had not been personally served, was an indispensable party and venue as to him was improper, and (2) that there was no diversity of citizenship between petitioner and respondent Brennan and no other basis for federal jurisdiction was shown (R. 4a). The court of appeals affirmed, but placed its decision on different grounds. The court held that the action was in reality against the United States; that under the Tucker Act, 28 U.S.C. 1491, a claim against the United States for breach of contract in excess of $10,000 must be brought in the Court of Claims; and that Section 10 of the Administrative Procedure Act,

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[4] As pointed out by the court of appeals (Pet. 27), the injunctive issue became moot when the hutment was completed by the second contractor. Petitioner takes no issue with this determination.

5 U.S.C. 1009, did not extend the jurisdiction of the federal courts to review the action complained of. Alternatively the court held that, because of the pendency of the administrative appeal, petitioner had not exhausted its administrative remedy, and could not yet invoke the jurisdiction of the courts (Pet. 28-29).

ARGUMENT

The decision of the court of appeals is clearly correct and there is no conflict with decisions of this Court or other federal courts. Further review by this Court is not warranted.

1. There is no doubt but that in reality the present suit is not an individual action against the respondents, but is a suit in contract against the United States. It is firmly established that where a public official acts in the line of duty and contracts with private persons or corporations on account of the government, such contracts are public and not personal and enure to the benefit of the government, not of the officer. *Hodgson* v. *Dexter*, 1 Cranch 345, 363. In determining whether a suit nominally brought against federal officers under such a contract is in reality a suit against the United States, this Court has stated that "the crucial question is whether the relief sought * * * is relief against the sovereign." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687. A request for a declaratory judgment upon a contract to which the government is a party is plainly a request for relief against the United States. *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145

(C.A. D.C.); *Nimro* v. *Davis*, 204 F. 2d 734 (C.A. D.C.), certiorari denied, 346 U.S. 901; *McKay* v. *Central Elec. Power Cooperative*, 223 F. 2d 623 (C.A. D.C.).

Further, petitioner demanded judgment for "the damages and loss of the plaintiff * * * and [determining] what part thereof shall be borne by the United States of America * * *." This clearly is a demand for damages against the United States and in substance and effect an "effort to collect a debt allegedly owed by the government." *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 375; cf. *Land* v. *Dollar*, 330 U.S. 731, 737. Since petitioner requests both declaratory relief as to the rights of the parties under the contract and an assessment of damages against respondents and the United States for unlawfully cancelling the contract, this is an action against the United States and subject to the Tucker Act.[5]

Under the Tucker Act, 28 U.S.C. 1346(a), the district courts have jurisdiction, concurrent with the Court of Claims, only over contract claims not exceeding $10,000. Petitioner's claim is in excess of $10,000. The court below was clearly correct, therefore, in holding that the Court of Claims, and not

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[5] Even if this suit could not be construed as a suit against the United States, the complaint was nevertheless correctly dismissed for lack of jurisdiction. Respondent Floete was never personally served, and as between petitioner, a New York corporation, and respondent Brennan, a domiciliary of New York, diversity of citizenship is lacking, and there is no other basis upon which federal jurisdiction could be founded. The district court so held (R. 4a).

the district court, was the only forum in which petitioner could seek the relief demanded. *Nimro* v. *Davis, supra.*

2. To sustain the jurisdiction of the district court petitioner relies upon Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. It is apparently petitioner's position that that section constitutes a waiver of sovereign immunity and a consent by the United States to be sued in the district court in all instances where the actions of an administrator are brought in question, including those where an adequate means of obtaining judicial review is otherwise provided. That contention is without merit.[6]

Neither Section 10(a) of the Administrative Procedure Act nor any other clause of Section 10 extends the jurisdiction of the district court to cases not otherwise within their jurisdiction. Cf. *Almour* v. *Pace*, 193 F. 2d 699 (C.A. D.C.); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932-933 (C.A. D.C.), certiorari denied, 350 U.S. 884; *State of Arizona* v. *Hobby*, 221 F. 2d 498, 500 n. 6 (C.A. D.C.); *Aktiebolaget Bofors* v. *United States, supra.* And Section 10(c) specifically excepts from review under the Administrative Procedure Act agency action for which there is some "other adequate remedy

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[6] In *Blackmar* v. *Guerre*, 342 U.S. 512, 515-516, this Court said:

> Certainly there is no specific authorization in [the Administrative Procedure Act] for suit against the [Civil Service] Commission as an entity. Still less is the Act to be deemed an implied waiver of all governmental immunity from suit. * * *.

in any court." A suit under the Tucker Act, when brought in the proper forum, provides a government contractor with an adequate opportunity to obtain judicial review of and relief from the allegedly wrongful acts of government contracting officers. This view is in complete accord with the comment of the Senate Committee on the Judiciary which, in explaining the meaning of Section 10 of the Administrative Procedure Act, stated that contract claims are reviewable under the Tucker Act and thus "are not affected by the procedure recognized by this section." Sen. Doc. No. 248, 79th Cong., 2d Sess. 36 (1946).

3. Pursuant to the disputes clause of the contract, *supra*, note 2, petitioner filed an appeal from the action of respondent Brennan in terminating the contract with the General Services Administration. That appeal is still pending before the General Services Administration Board of Review.

A government contractor is not entitled to seek judicial review until it has complied with the administrative procedures provided by the standard government disputes clause. *United States* v. *Holpuch Co.*, 328 U.S. 234. Moreover, the termination of a contractor's right to proceed with performance of a contract does not absolve him of his obligation to comply with the contractual method of settling disputes as a prerequisite to judicial review. *In re Utility Oil Corp.*, 69 F. 2d 524 (C.A. 2), certiorari denied, 292 U.S. 655. Until the administrative procedures have been exhausted the courts have no jurisdiction over

a claim arising from the contract. *United States* v. *Smith*, 152 F. Supp. 322, 326-327 (E.D. Pa.); *Atlantic Carriers* v. *United States*, 131 F. Supp. 1, 5 (S.D. N.Y.). That principle provides a further independent ground for the dismissal of petitioner's action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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October 1960.

APPENDIX

1. Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U.S.C. 1009, provides as follows:

> Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of review.
>
> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) Form and venue of action.
>
> The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.
>
> (c) Reviewable acts.
>
> Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary,

procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * *

2. Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. § 1346(a)(2) and 1491, provides as follows:

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * *

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority.

The Court of Claims shall have jurisdiction to render judgment upon any claim against the

United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

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